NGANG NGUK MOI

v.

CHEN AI CHOO

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HELILIAH MOHD YUSOF JCA
WAN ADNAN MUHAMAD JCA
[CIVIL APPEAL NO: J-02-461-2005]
12 JUNE 2008

FAMILY LAW: *Children - Custody - Appeal against custody order given to natural mother - Natural mother had left child in aunt's care - Whether for adoption - Whether wishes of child considered - Whether probability of relationship between child and aunt cemented over time - Whether pre-requisites of s. 13 Guardianship Act 1961 complied with*

The respondent was granted custody in respect of her child ('the child') whom she had left in the care of the appellant when the child was four years of age. The appellant was the aunt of the respondent who now appealed against the custody order. It was an agreed fact that the respondent was a single mother with other children to support. The respondent submitted that she left the child with the appellant for temporary custody only whilst the respondent submitted that the child was handed to her for eventual adoption witnessed by other family members. Further, the respondent had voluntarily handed over all the relevant documents pertaining to the child to the appellant at the material time.

Held (allowing the appeal and ordering a retrial)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) There were no attempts made to elicit the wishes of the child or her responses to the idea of returning to her natural mother. There was also no welfare report from the welfare department placed before the judge to be scrutinised. Additional evidence might be required to assist the court given the circumstances of the case. The interest of the child would be well served if a proper evaluation report had been obtained to ascertain the actual picture prior to the making of the custody order. (paras 13 & 14)

(2) By the time the matter came up herein, the child was already twelve years old with all her mental faculties developed. Some emotional relationship would have been cemented between her and the appellant during that time. (para 15)

(3) The pre-requisites of s. 13 of the Guardianship of Infants Act 1961 must be satisfied. Firstly, that the respondent was the lawful guardian of the child in the context of the Act. Secondly, that the child was removed from the respondent. There was no evidence adduced to establish that the respondent was the child's legal guardian and by the respondent's own admission, the child was never snatched away from her but ceremoniously handed over to the appellant in full sight of family members. That being so the court was duty bound to intervene as the High Court had fundamentally misdirected itself. (paras 19 & 20)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah diberikan hak jagaan anaknya ('si anak') yang beliau tinggalkan di bawah jagaan perayu semasa si anak berumur empat tahun. Perayu yang merupakan emak saudara responden kini merayu terhadap perintah jagaan. Adalah tidak dipertikai bahawa responden adalah seorang ibu tunggal dan mempunyai anak-anak lain untuk ditanggung. Responden berhujah bahawa beliau tinggalkan si anak dengan perayu hanya untuk sementara waktu sahaja, sementara perayu berkata si anak diserahkan kepadanya untuk dijadikan anak angkat dengan disaksikan oleh beberapa ahli keluarga lain. Responden juga dikatakan telah menyerahkan kepada perayu segala dokumen berkaitan dengan si anak.

Diputuskan (membenarkan rayuan dan memerintahkan perbicaraan semula)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Tiada percubaan dibuat bagi mencungkil keinginan si anak atau pandangan beliau mengenai kepulangannya kepada ibu kandungnya. Juga tidak terdapat laporan jabatan kebajikan masyarakat untuk dilihat dan diteliti oleh hakim. Berdasarkan halkeadaan kes, keterangan tambahan mungkin diperlukan untuk membantu mahkamah. Kebajikan si anak mungkin dapat dijamin jika satu laporan penilaian yang sewajarnya diperolehi bagi mendapat gambarannya yang sebenar sebelum perintah jagaan dibuat.

(2) Sewaktu halperkara sampai ke mahkamah ini, si anak sudah pun berumur dua belas tahun dan mempunyai keupayaan berfikir sendiri. Dalam masa itu, satu perhubungan emosi mungkin sudah terjalin di antara beliau dengan perayu.

(3) Kehendak-kehendak s. 13 Akta Penjagaan Budak 1961 harus dipatuhi. Pertama, responden adalah penjaga undang-undang si anak dalam konteks Akta. Kedua, si anak telah dipisahkan dari responden. Tiada keterangan dikemukakan untuk membuktikan bahawa responden adalah penjaga undang-undang si anak dan menurut responden sendiri si anak tidak diambil darinya tetapi diserahkan dengan penuh upacara kepada perayu dengan disaksikan oleh saudara mara mereka. Dalam keadaan sedemikian, mahkamah bertanggungjawab untuk campur tangan kerana Mahkamah Tinggi jelas telah tersalah arah akan dirinya.

Case(s) referred to:
Leo Fasterners Sdn Bhd v. Wilayah Leasing Sdn Bhd [2006] 1 CLJ 121 CA ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Legislation referred to:
Guardianship of Infants Act 1961, ss. 11, 13

For the appellant - Nga Hock Chen; M/s Nga Hock Chen & Co
For the respondent - K Bharathi; M/s Kamarudin Yusof & Assoc

[Appeal from High Court, Johor Bahru; Originating Summons No: 24-167-2003 (MT-3)]

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar JCA:

[1] This appeal relates to a custody order dated 1 March 2005 meted down by the High Court judge, granting custody in respect of a child to the plaintiff (hereinafter referred to as the respondent) who is the natural mother. The child's name is Ang Ying Xuan (female) and was born on 18 April 1997. Being dissatisfied with the outcome the defendant, hereinafter referred to as the appellant, had filed this appeal. The appellant is the aunt of the respondent. Having heard the appeal we unanimously had allowed the appeal with costs and accordingly ordered a retrial. The High

A Court order was also set aside and the deposit returned to the appellant. Pending the disposal of this matter at the High Court we ordered that the child remain with the appellant.

[2] I now reproduce some additional relevant facts of the case. B It is an agreed fact that the respondent is a single mother. In short the child was born out of wed-lock. She then took care of the child for four years before handing over the child to the appellant in March 2001. The originating motion filed by the respondent stated her inability to take care of the child as the C reason for the handing over. Yet in her police report the respondent gave another reason that is the appellant did not have a daughter. It was not denied that the appellant had sons. Subsequently the respondent demanded the return of the child but was rebuffed and in the course of it was informed by the D appellant that she intended to legally adopt the child. Needless to say this intention was objected to.

[3] The respondent had stated that the handing over of the child was temporary in nature though hotly disputed by the appellant. The latter was backed up by the respondent's mother E who admitted being present during the discussion; as far as she was concerned the handing over of the infant was not temporary but with adoption in mind by the respondent. It was also alleged by the respondent's mother that her daughter was going through financially hard times at that material time. Thereafter their F relationship soured, with both parties engaging solicitors and in the course of it dragging the police into the affray.

[4] With both parties unable to resolve the matter amicably, the respondent commenced legal proceedings praying for several reliefs G at the High Court in January 2003, inclusive of the order that the respondent, as the natural mother be given custody of the child. The learned judge on 1 March 2005 allowed the respondent's application. Being dissatisfied with the order, the appellant filed an appeal on 9 March 2005 hence the hearing before us.

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[5] I now add more details. As stated earlier, before the learned High Court judge, counsel for the appellant had articulated that the child was handed over by the respondent not for temporary custody, but for eventual adoption. This stance, though orally I made, was witnessed by the respondent's natural mother and other family members. The permanency of the handing over was evinced further by the fact that at the material time all relevant

documents eg, the child's birth certificate and passport were voluntarily handed over to the appellant. As consent would not be obtained from the respondent the appellant had held back the adoption application.

[6] The appellant had canvassed that the child was very healthy and stable and happy with the current surrounding circumstances. During the four years under the appellant's supervision, the child had developed a good and close relationship with her and the other family members. She was also doing well in her studies in school. As regards expenses in raising the child, all were borne by the appellant, with the respondent never offering any financial help. It was also submitted that the respondent's questionable personality certainly was not good for the infant.

[7] Not unexpectedly the respondent had submitted that it was in the best interest and welfare of the child that custody be given to her. She was the natural mother, and that was her wish, as a parent in the words of s. 11 of the Guardianship of Infants Act 1961. Plaintiff never intended to give up her child to the defendant permanently. The fact that she had made attempts just nine months after the child was handed over to the appellant, further supported her contention that the child was to be cared for temporarily, and forms evidence of her intention and state of mind at that material time.

[8] The child has two other siblings and certainly would be in her best interest that they were raised together under one roof rather than being kept apart. On the other hand there were no children of the same age group at the appellant's residence.

[9] The respondent stated that the appellant was already advanced in her years whilst she was only 35 years old. In the course of the hearing the respondent affirmed that she earned M2000 per month and financially secure, thus enabling her to employ a maid.

[10] The learned judge had written that no evidence was produced by the appellant to demonstrate that there may be factors present that would make the respondent unfit in her role as a mother. In the absence therefore, of any compelling factors that may point to the respondent's unfitness to carry out her responsibilities as a caring mother, the fact that she is the natural mother, weighs positively in her favour. There is no evidence also

to indicate that she has in any way been derelict in her motherly duties towards her other two children who live with her. The child would also have the benefit of the company of her siblings all raised under one roof.

[11] The learned judge further stated that the potential benefits to be gained by these combined factors in the long run would outweigh the short term inconvenience of displacing the child from her present environment to the new one.

[12] As stated in the introductory paragraph we had allowed the appeal after having heard both parties. The reasons for the retrial order are as follows: This was a trial by affidavit with the earliest record of a hearing in chambers being 25 November 2004. Based on the reasoning that the child was at school the case was postponed to 7 December 2004. On that day after some haggling, parties were ordered to file written submissions, and the case was thereafter was postponed to 1 March 2005. On this latter date order in terms was granted. It is pertinent to note that prior to the pronouncement of this decision, not a single witness was called or the infant questioned by the learned judge in the friendly surroundings of his chambers, assisted by a lady interpreter. In a gist the learned judge could not be said to be in a better position than this panel as he never was put to the test to assess the conduct or demeanour of any witness.

[13] It is all fine to state the right principles that in cases of this nature the child's welfare is of paramount consideration, but without evidence and material to assist the court, the eventual decision may be flawed. In the context of this case we were quite surprised that the child was never even delicately probed. No attempts were made to elicit the wishes of the child or her responses to the idea of returning to her natural mother. Sometimes the body language of a child of eight years may adequately tell where words may have failed.

[14] We were also surprised that there was no welfare report from the Welfare Department placed before the judge to be scrutinised. In as much as a judge will be the final decider of facts that does not detract from the reality of life that no judge will be able to freely step into the world of the contesting parties, surrounded by their myriads of problems. In contrasting fashion, welfare officers are veterans on the ground, capable of

manoeuvring into the lives of the contesting parties, assessing their financial well-being, witnessing the 'real' relationship between siblings, family members and asking the right questions in real time. In the case before us, where the respondent appears to be a person of somewhat loose morals, having to support three children out of wedlock, fathered by a married foreigner, and the full weight of her family against her, surely additional evidence may be required to assist the court. Bottom line, the interest of the infant would have been well served if a proper social evaluation report had been obtained, to ascertain the actual picture prior to the making of the custody order.

[15] To top it, after the custody order had been meted down by the High Court, another court order was obtained which suspended the earlier custody order. The result was another protracted heart rendering delay of fours years before the child could possibly meet up with the mother and her other siblings. The repercussion was another four years of separation grossing the separation to eight years. By the time the matter was heard by us the child is already grown up. She is twelve years old now with all her mental faculties well developed. By effluxion of time, to deny that some emotional relationship must have been cemented between her and the appellant now, would be bordering on the improbability.

[16] To add to the above unsatisfactory features, we were quite perturbed by the assertion of the respondent that she was financially well endowed, hence her capability to hire an Indonesian maid by the name of Heni Binti Mol. Yet a reading of p. 119 of the rekod rayuan shows that this person was not engaged by her but by a person called Teo Kim Fe. With such obvious untruthfulness, it becomes necessary to fully scrutinise her financial capacity to support another growing child, as to permit her to benefit from her deception not only is morally wrong but may be prejudicial to the long term interest of the child.

[17] With the issue of facts out of the way, perhaps it is timely that I discuss the remarks of the learned judge when he said:

> The court's jurisdiction in such circumstances is derived from section 13 of the Guardianship of Infants Act 1961 which deals primarily with the power of the court to return an infant to the custody of his lawful guardian whilst section 11 of the Act deals with the matters which must be considered by the court in its powers ...

[18] The question to be resolved is, was the learned judge right in alluding to s. 13 of the Guardianship of Infants Act 1961 (or the Act) when stating that the jurisdiction of the court to act was pursuant to this latter provision, in the circumstances of the case? Having sifted the all affidavits I was unable to detect any reference to this provision. The submission of the appellant told a different story as it was referred to in some detail, with parts of it being ventilated in the following manner: "the plaintiff's application in enclosure is for custody of the child to be returned to her under s. 13 of the Guardianship of Infants Act 1961." Perhaps the learned judge was influenced by this portion of the submission as he did make specific mention of it in the written judgment. With respect we see matters differently, as the basis of the custody order in favour of the respondent, did not fit in with the provision's requirements.

[19] In relation to this appeal, with particular reference to s. 13 of the Act, before a court orders that an infant be returned to the lawful guardian, certain prerequisites must be satisfied first, *inter alia*, that:

i. the respondent is the *lawful guardian* of the infant in the context of the Act; and

ii. that the infant was removed from the respondent.

[20] With respect there was no evidence before the court to establish that the respondent was the child's legal guardian, and by the respondent's own admission, the infant was never snatched away from her, but ceremoniously handed over to the appellant in full sight of family members. That being so we are duty bound to intervene as it was obvious here that the court had fundamentally misdirected itself (*Sivalingam a/l Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545). The court there had said:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[21] To wind up the matter, it was not a question of disturbing the findings of fact of the learned judge and replacing it with our findings, or that the respondent should have been given the custody of the child or not, but rather the rectifying of the obvious dissatisfaction with the flaws present prior to the decision. We have also amply demonstrated all the relevant considerations as discussed above, where the learned judge had failed to take into account, or had fundamentally misdirected himself, thus demanding our intervention. In a nutshell there were appealable errors that led to the flawed decision demanding interference by us (*Leo Fasterners Sdn Bhd v. Wilayah Leasing Sdn Bhd* [2006] 1 CLJ 121).

[22] With all the flaws factored in, and after due deliberation, this panel had taken the view that in the interest of the child the appeal be allowed and a retrial ordered.